prison, juvenile facility, or other correctional institution or facility.

2. The person is subject to an order of commitment chapter 229A.
3. The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or after July 1, 2002.
4. The person is a minor or a ward under a guardianship.

First Amendment to the United States Constitution:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 10 of the United States Constitution

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; Pass any Bill of

Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article IV, Section 2

The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States.

IV. STATEMENT OF THE CASE

Proceedings Below

The Iowa Sex Offender Residency Restriction, Section 692A.2A, went into effect on July 1, 2002.

This civil rights class action suit was filed on June 24, 2003 by three John Does on behalf of the class of all sex offenders in the state of Iowa subject to the new legislation, § 692A.2A. After a hearing Judge Robert Pratt granted the temporary restraining order in addition to granting class certification of both plaintiff and defendant classes. Appx. 1a.

A final evidentiary hearing was held on December 15 and 16, 2003. The Court heard testimony about 17 sex offenders and experts from both sides. In addition plaintiffs presented maps showing the areas of different towns where class members could not live. On February 9, 2004, the District Court permanently enjoined the statute finding among other things that it violated the *ex post facto* clause, the right to travel and the right to live with one's family. Appx. 28a.

Defendant Thomas Miller, the Iowa Attorney General, appealed. On April 29, 2005, the Eighth Circuit reversed the injunction finding the statute constitutional. Judge Melloy dissented in part, concluding that the statute violated the *ex post facto* clause, as applied to those people who committed their crimes prior to the enactment date of the statute, July 1, 2002. Appx. p 98a.

The plaintiff class sought rehearing *en banc*. Five of the 11 judges on the Eighth Circuit would have granted rehearing *en banc*. Appx. p. 152a.

The Statute

The Sex Offender Residency Restriction, Section 692A.2A provides that sex offenders who committed their crimes against minors "shall not reside within 2,000 feet of the real property comprising a public or non-public elementary or secondary school or a childcare facility."

The statute creates exclusion zones around "child care" facilities and schools in the shape of circles with a radius of 2,000 feet. The definition of "child care facilities" includes not only registered daycare centers but also registered childcare homes.[1] There are a lot of circles.

The statute includes a limited grandfather clause. The restriction does not apply to any residence established prior to July 1, 2002. Offenders are allowed to continue to live where they were living as of the effective date of the statute.

There are no other exceptions whatsoever to the statute.

There is no time limit for how long the restriction lasts. While registration lasts in many cases for only ten years, the residency restriction is not so limited.

Factual Discussion

With the enactment of the Iowa Residency Restriction statute in 2002 something really bad happened. Most sex offenders were banished from towns of any size in Iowa.

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[1]In Iowa in order to establish a childcare home there is no fee and it is not necessary to have any children actually enrolled. In 2003 there were 7,000 "childcare facilities," of which close to 2,000 were new listings since the 2002 database. (Plaintiff's Exhibit 61).

Because of the limited grandfather clause it took a while for the effects to materialize. By December, 2003 when the evidentiary hearing was held, enough time had passed to understand what this statute does and how it effects the class and their families.

For a good understanding of what happens under the statute, it is necessary to consider three things. First there is the fact question of how much of the available housing in Iowa is eliminated by the statute. Second it is important to identify the people affected by the statute. Finally it is important to understand how those people are devastated by this statute.

The statute creates many, many circles within which sex offenders cannot live. On some level the analysis is simple. There are so many circles that there is nowhere for the class to live.

There is a clear pattern in Iowa after examining the many maps presented to the district court.

1. "In larger cities such as Des Moines and Iowa City, the maps show that the 2,000 foot circles cover virtually the entire city area. (See Plaintiff's Exhibit 9A, 11A.) The few areas in Des Moines, for instance, which are not restricted, include only industrial areas or some of the city's newest and most expensive neighborhoods." District Court Finding, Appx. p. 39a. See maps of Des Moines (population 198,682)and the Waterloo-Cedar Falls (population 104,892) area. Appx. p. 156a-157a.

2. In midsize towns (for Iowa) with population of over 10,000 the pattern is the same. See maps of Mason City (population 29,172), Appx. p. 158a, and Carroll (population 10,106) Appx. pp. 155a.

3. In towns smaller than 10,000, but large enough for their to be a school or childcare facility, the entire town is off limits. Solon (population 1177) and Oxford (population 705) are examples. Appx. p. 159a.

4. With the very small towns, under 250 people, if there is no school or childcare facility there is no restriction. At the same time all it takes to entirely block off the town is for one person to register as a child care provider.

5. There is no restriction on houses in the country.

This pattern can be clearly seen by examining the town of Carroll, population around 10,000 and the surrounding Carroll County. A map of the town of Carroll and the statistics for Carroll County were presented at trial and appear along with the appropriate chart at pages 153a-154a of the Appendix. In Carroll County, 76% of the available housing units in the County are off limits. In the town of Carroll however, 98% of the housing units are off limits. In fact for the entire county, 98% of the housing units are off limits in towns greater in population than 200 people.

The statute makes that very large percentage of housing off limits. Sex offenders are left to find housing in the remaining areas, primarily the country. They can find housing assuming that housing is vacant and assuming that it is available to sex offenders. The testimony at trial was that when class members went to look at that small amount of housing that was left, there were often no vacancies, they could not afford the prices, or landlords would not rent to sex offenders.

The class consists of sex offenders of all types, as long as

their victims were under 18. There were around 5,000 such persons at the time of the hearing. Of the 17 persons whose situations were examined at trial, two were college students. One was retarded and on Social Security disability. Five were married. Four had children living in the home. Seven had been in prison. Ten had received probation. Five were still on probation or parole. Four owned their own home. Five had committed misdemeanors. Four had been evaluated as "low" risk to reoffend. Two were individuals who had committed their crimes in another state but lived in Iowa, had to register in Iowa and were therefore subject to the statute. In their cases, because of the fact that Iowa has a different age of consent for sexual activity, their behavior would not even have been criminal in Iowa.

The effect of the statute on these individuals has been real and has been compelling.

Some members actually experienced additional incarceration. John Doe II, IV, and XVIII were actually stuck in prison or in a halfway house because they could not find an "acceptable" place to live. They had been cleared for release. Before they can actually leave the facility housing must be approved. To be "approved" housing would have to be "legal". That is very difficult under the statute. In many cases the housing sought would be with immediate family. John Doe IV for example was released from prison after the injunction was imposed and went to live with his mother. Appx. pp. 43a-44a, 53a.

Some members are stuck in the house where they were living on July 1, 2002. This can be hard. John Doe VII is one of

the class members who committed an act that would not even have been illegal under Iowa law. In 2002 he was living in a two bedroom apartment with his wife and small child and mother-in-law. He could not move to a bigger place because of the law. In December 2003 his second child was born. His probation officer would not have objected to his moving to bigger house as long as the house was not right next to a high school. Appx. pp. 45a-46a.

Once class members moved from their July 1, 2002 residence they have experienced much difficulty. John Doe XIV and his wife testified. He had pled guilty to the serious misdemeanor in 1995 after exposing himself at a party where a 13 year old girl was present. He was 19. He is a low risk to reoffend. He completed probation. In the summer of 2002 his wife was expecting their second child. Not imagining that the new law applied to them, they moved to a house on a street with shade trees in Waterloo. They thought their daughter would love the house because it was near the elementary school playground around the corner. When he registered the new address with the sheriff on August 1, 2002 he was told he could not live there. He spent two months looking for a place to live in Waterloo. The only places "available" were in an exclusive and high priced neighborhood. They wound up buying a house in the country about 45 miles from Waterloo. He commutes an hour each day to work. In many ways his wife's testimony was even more compelling. She had to quit her job in Waterloo when they moved to the country. She now works two jobs, making less than she did in the city. They have left their family and friends in town. She has to drive 16 miles each day to the daycare center for her children. Appx. pp. 50a-51a.

John Doe X was convicted of a simple misdemeanor that was a sex offense. He completed probation. He and his wife both receive disability payments because of mental illness and retardation. To comply with the statute he and his wife moved to an apartment complex outside of town. This interferes significantly with the receipt of services. Appx. pp. 47a-48a; Exhibit K2.

John Doe XII was convicted of a misdemeanor and successfully completed probation. Before the residency restriction went into effect, he was going to college, living in a college dormitory, and getting good grades. He had a grant that covered the cost of room and board. At the time the restriction went into effect, he was living with his parents for the summer. He could not go back to the dorm in the fall because there was daycare center nearby. Since he could not move back to the dorm, he lost his grant for room and board. He had to commute back and forth from his parent's house. His commute was two hours per day. He was regarded as a low risk to re-offend. His probation officer allowed him to live in the dorm before the law went into effect. Appx. pp. 48a-49a.

ARGUMENT

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THE SUPREME COURT.

The ability to choose where one wants to live, and to live if one chooses with one's closest relatives, are core aspects of personal liberty that most Americans take for granted. For all practical purposes, Section 692A.2A deprives convicted sex offenders in Iowa of those fundamental rights, even if they were convicted before the statute was enacted. It does so by a modern day form of banishment that merits this Court's plenary review. The need for review is especially true because numerous states have now either passed or are considering laws similar to Iowa's.

Residency restriction statutes for sex offenders, such as Iowa Code Section 692A.2A, are of relatively recent vintage. This new phenomenon seems to be contagious. The State of Alabama adopted its law in 2001. Iowa adopted § 692A.2A in 2002. By early 2004, when the district court published its opinion, there were 12 states with such restrictions. Since the district court opinion, Missouri, Indiana, Washington and Texas have all adopted residency restrictions.[2] The Michigan

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[2]Ind. Code Ann. §.11-13-3-4(g)(2) ("As a condition of parole, the parole board shall... prohibit the offender from residing within one thousand (1,000) feet of school property..."); Mo. Code Ann. § 566.147 ("Any person who has...been convicted of...[certain sexual crimes against minors] shall not establish residency within one thousand feet of any public school,... any private school,... or child care facility"); House Bill 1147, 2005 Wash. Session Laws, which went into effect on 7/24/05 (The Department may not approve a residence location if the residence is within a community protection zone. That is 880 feet from a public or private school.); Tex. C.C.P. Ann. § 42.12 (13B) ("If a judge grants community supervision to a

legislature just passed its restriction this month and it is waiting for the governor's signature at this time.[3]

There is every reason to believe that the number of jurisdictions with such statutes will increase substantially. One choice for sex offenders who are faced with the Iowa statute is to move to other states. To the extent that at the moment Wisconsin, Minnesota, South Dakota and Nebraska do not have such restrictions one can only imagine that they will enact them very soon if not this next legislative session. Indeed since September 1, 2005, when the District Court injunction in this case was dissolved, at least one town across the border from Iowa in Nebraska has adopted its own ordinance restricting where sex offenders can live. South Sioux City ordinance no. 2005-30.[4]

Of all the statutes around the country, Iowa, at 2,000 feet, is one of the most restrictive. To the extent that the Eighth Circuit has approved one of the most restrictive statutes, it follows that the statutes elsewhere in the country would be

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defendant... and the judge determines that a child... was the victim of the offense, the judge shall [require] that the defendant not...go in, on, or within 1,000 feet of a premises where children commonly gather...").

[3]See Enrolled Senate Bill No. 617; (An individual required to be registered shall not reside within a school safety zone, which is 1000 feet.)

[4]South Sioux City Ordinance 2005-30 prohibits all sex offenders from residing within 2000 feet of schools and day care centers. It also goes on to restrict residences within 2000 feet of school bus stops, playgrounds, parks or other places children congregate.

acceptable under Eighth Circuit analysis. Indeed Judge Colloton in his opinion noted that this choice on distance is the "sort of task for which the elected policy officials of the State....are properly suited." In the same sentence he observed that he would reach the same conclusion whether the limit was "across the street" or "500 feet or 3,000 feet." Appx. p. 122a.

Consideration of the case by the Supreme Court is necessary and appropriate in light of the potential conflicts between the states with regard to this matter. Now that Iowa has its 2,000 foot barriers approved, sex offenders in Iowa may decide to move across the state borders into South Dakota, Nebraska or Minnesota, jurisdictions which do not have as significant or any barriers on establishing a residence. This in turn will prompt those states[5] or perhaps even municipalities[6] in those states, to erect barriers to keep the sex offenders out. It should be

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[5]The Florida legislature is considering a law to increase the distance from 1000 feet to 2500 feet. Rep. Susan Goldstein, who introduced the bill said the ultimate goal is "to get these people out of our neighborhoods and hopefully out of our state". Jason Garcia, *Legislator seeks statewide law limiting where sex predators can live*, SOUTH FLORIDA SUN-SENTINEL, September 15, 2005, http://www.sun-sentinel.com/news/legislature/sfl-fpred15sep15,1,5133931.story.

[6]Orange Beach, Alabama, not satisfied with Alabama's 2000 foot restriction, has this month adopted an ordinance that bars sex offenders from living or working within four miles of schools, day cares, parks and public beaches. Ryan Dezember, *City tightens sex abuser restrictions*, MOBILE REGISTER, September 8, 2005, http://www.al.com/printer/printer.ssf?/base/news/1126171041410 70.xml&coll=3.

remembered that most class members are not on probation or parole. For that reason they are otherwise free to move throughout the United States. The barriers created by these statutes and the competition between states and municipalities to keep out sex offenders will result in sex offenders having no place to go at all, in any state.

The consequences of the statute remaining in effect are enormous. The district court found that this statute as a practical matter amounts to banishment. Sex offenders are banished from most towns in Iowa with populations greater than 250 people. They cannot live with their immediate family members if their family members have already established residences or own homes in those towns. If they become homeless they cannot in many cases even stay in homeless shelters. That would be prohibited if the shelters were within an exclusion zone.

There are several significant constitutional problems with these residency restrictions. The statutes are punitive creating problems under the *ex post facto* clause when applied to offenders who have already committed their crimes. There are also several fundamental rights that are implicated by this statute. Those particular constitutional protections, the right to travel and the right to live with one's immediate family, are discussed in later sections of this petition.

The statute was analyzed by the Eighth Circuit the same as if it had been a zoning regulation. Given the fundamental rights implicated and the punitive nature of the statute, such analysis was inappropriate and contrary to this court's rulings with regard to those fundamental rights. Analyzed with anything other than the most deferential rational basis, the statute will not survive.

There is no real reason for such draconian measures. The Iowa statute does not really make people safer. The State already has the authority to prosecute sex offenders for violating the law. The State has already greatly lengthened the sentences for these offenses. This Court has permitted states, such as Iowa, to initiate civil commitment proceedings against dangerous sex offenders as they finish their imprisonment.

But nothing in this Court's prior rulings authorizes what Iowa has done here. Indeed petitioners know of no other instance in modern American life in which a class of people have been declared *persona non grata* by communities across the country. The question of whether states may constitutionally banish convicted sex offenders presents a novel issue of national significance and scope. Certiorari is appropriate at this time and for this case.

II

THE DECISION BELOW CONFLICTS WITH RELEVANT DECISIONS FROM THIS COURT INTENDED TO SAFEGUARD CRITICAL CONSTITUTIONAL RIGHTS

A. The decision conflicts with prior law with regard to a determination of whether banishment violates the *ex post facto* clause

This Court two years ago in *Smith v. Doe*, 538 U.S. 84 (2003) was presented with an *ex post facto* challenge to the Sex Offender Registry in the State of Alaska. In holding the Alaska registration law constitutional the Court set out quite clearly the analytical framework for considering whether such a statute

amounted to "punishment" which would have been proscribed by the *ex post facto* clause.

The Eighth Circuit decision in this case was divided on the question of whether 692A.2A amounted to punishment and therefore violated the *ex post facto* clause. The analysis by the majority, finding the statute not to be punishment, substantially weakened the analytical framework established by *Smith* to the point where the analysis does not constitute much of a barrier at all. This cannot be what was intended in *Smith*.

The Eighth Circuit watered down the *Smith* analysis in two respects. First, the majority decision ignores the factual finding that the statutory banishment is similar to a traditional punishment. Second, the decision does not critically and carefully consider whether the statute is excessive.

One of the five analytical factors to be considered under *Smith* in deciding whether a law is an *ex post facto* violation, is whether the restriction is a traditional form of punishment. 538 U.S. 84 at 98. The Supreme Court in *Smith* specifically identified banishment as one of those traditional forms of punishment. 538 U.S. 84 at 99. The Eighth Circuit's opinion below holds that the law in Iowa did not constitute banishment because offenders were still free to venture into the towns where they could not live. Appx. p. 131a.

While it is true that Iowa offenders can still work in those towns and, for that matter, can even stand right across the street from a school without running afoul of the statute, that fact is beside the point. The District Court made a finding of fact that the statute virtually eliminates all available housing in towns of any size in Iowa. Appx. pp. 39a-40a. As Judge Melloy

observed, that finding is "not clearly erroneous and should therefore be upheld." Appx. p. 140a. The practical effect of such a law is that sex offenders must reside in remote rural areas or in another state. As a practical matter this restriction significantly prevents a sex offender from living in the community. This means that the Iowa statute, for all practical purposes, is same as the historic "banishment."

As Judge Melloy observed;

> The residency restriction is a permanent stigma as well as a law that effectively casts the person out of the community. Further, *Smith* also described banishment situations in which individuals could neither return to their original community nor, reputation tarnished, be admitted into a new one. (citation omitted). Under this phrasing Section 692A.2A fits the definition of banishment. Appx. p. 141a.

In *Smith* this court held that one of the factors to be considered was whether the statute is excessive in relationship to the purpose. 538 U.S. 84 at 97.

Again Judge Colloton and Judge Melloy significantly differed on this part of the analysis. Judge Colloton found the statute was not excessive in light of some of the recidivism evidence and the conclusions of some of the defendants' witnesses that there were never going to be any guarantees that sex offenders would not reoffend. Appx. p. 135a. Judge Melloy however focused on the fact that the statute applies to all sex offenders who offended with minors regardless of the level of risk or the nature of the offense. Judge Colloton dismissed this

analysis by stating that the Supreme Court's discussion of excessiveness does not require "a close or perfect fit." Appx. p. 135a.

As to the possibility of sex offenders reoffending, it is true that in the *Smith* case the Supreme Court all but took judicial notice of a high rate of recidivism posed by sex offenders.[7] The evidence presented in this proceeding was that sex offender recidivism rates are not be as great as had been thought.[8] In fact even if the reoffense rate was 13%, that means that only one out of 7 or 8 offenders will reoffend.

The suggestion of witnesses for the State that one can never really be sure about sex offenders is reminiscent of testimony by

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[7]Such reliance by the Supreme Court and other courts might be outdated. Sex offender treatment only really became available in Departments of Corrections during the 1990s. In addition punishment for sex offenders substantially increased during that same time period. Statistics that were published in 1997 that were discussed by the Supreme Court in *Smith* would have relied on case studies prior to or only at the beginning of such treatment and/or increased punishment. Dr. Rosell, the Plaintiff's expert and former director of the Iowa Department of Corrections program, testified that successful treatment has the effect of reducing recidivism by over 40%. Tr. p. 28.

[8]The Hanson and Bussiere meta study of 61 prior studies concluded that there was a rate of 13.4%. Hanson and Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 JOURNAL OF COUNSELING AND CLINICAL PSYCHOLOGY, No. 2, 348-362. Exhibit 50. That rate, extrapolated from data going back several decades, in turn would have to be factored downward with the growing availability of treatment, which reduces recidivism by perhaps 42%.

witnesses that "anything is possible." One cannot legislate for such remote possibilities without a real concern for producing an exaggerated response.

In *Smith* the Supreme Court accepted the "categorical judgment" by the legislature which was not individualized because the restraint at issue in *Smith* was the "more minor condition of registration." 538 U.S. 84 at 104. This was in contrast with the individualized determination in *Kansas v. Hendricks*, 521 U.S. 346 (1997) where there was a much greater restraint. Given the very significant consequences that accompany the Iowa statute *Smith* requires a greater fit for this particular statute.

The Iowa statute is excessive and unnecessary in a variety of ways.

1. It applies to all sex offenders who had minors as victims regardless of the nature of their crime and the kind of school nearby. Teenage offenders with teenage victims do not have to be kept away from childcare facilities. Dr. Rosell testimony, page 21.

2. There is no reason to keep sex offenders away from childcare facilities. Dr. Rosell sees no safety concern whatsoever with regard to childcare facilities. Toddlers just do not walk home by themselves. Children are picked up and dropped off every morning by their parents. Given state-mandated supervision, there is no safety interest enhanced by the two thousand foot law. Trans. p 43;

3. The statute applies regardless of level of risk. For years Iowa classified its offenders by level of risk. It is excessive to apply this residency restriction to a person who was determined

to be low risk.

4. The statute applies regardless of whether individuals are presently on supervision. Probation officers can always keep the person away from a particular facility, if, upon an individual determination, that seems appropriate. After making that individual determination, various probation officers had no objection to various John Does living within 2000 feet of particular childcare facilities.

5. There is no scientific evidence whatsoever that there is any greater safety if a sex offender does not live within 2000 feet of these schools. Almost half of all sex offenses occur within the home. Another twenty-five (25) to thirty (30) percent offend with friends and neighbors. (Rosell Tr. p. 19.)[9]

6. The restriction applies for life.

Perhaps more importantly there is evidence that the statute can decrease safety. It decreases safety in a number of ways:

1. If individuals know that their residence is unlawful they may not register at all. Thus the statute may undercut the effectiveness of the registration process.

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[9]None of the scientific studies of recidivism have even looked at proximity to a school as a factor in re-offending. (Tr. p. 38) For all this time people who have been studying the problem have, in fact, been trying to identify the factors of re-offending. No one has even thought enough about proximity to a school to even test that supposition. (Tr. p. 73) The one exception is the Minnesota study, Exhibit 41. That study was prompted by legislative interest in laws such as Iowa's restricting where sex offenders can live. The Minnesota Department of Corrections study concluded that there was no connection at all between reoffending and living near a school or childcare center.

2. The statute undercuts the abilities of individuals to obtain viable treatment. The State's expert, Dr. McEchron testified that treatment would be harmed if individuals' lives became chaotic. Deposition p. 38. Not having a legal place to live, obviously, would be chaotic. Moving all the sex offenders into particular sex offender ghettos, or into the country where they experience isolation, is not conducive to treatment. Dr. McEchron also believed taking offenders away from their family and support systems interferes with treatment. Deposition pp. 56-7. By undercutting treatment, safety is diminished. Dr. Rosell agreed with both of these conclusions. Tr. p. 41.

This Court should reach the same conclusion reached by Judge Melloy as to whether the Iowa statute is excessive.

> (T)he severity of residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders' lives, makes the residency restriction excessive. Appx. p. 143a.

The question of whether the Iowa Statute is punitive deserves more scrutiny than the Eighth Circuit gave. The *Smith* analysis would not have authorized such a severe statute as Iowa adopted. For this reason this court should grant *certiorari*.

B. <u>The decision conflicts with prior law with regard to the fundamental right to travel</u>.

This Court has long recognized the fundamental right to

travel. In *United States v. Guest*, 383 U.S. 745, 757 (1966), the Supreme Court stated that the "constitutional right to travel from one state to another occupies a position fundamental to the concept of our federal union. It is a right that has been firmly established and repeatedly recognized." This right is protected by the Due Process Clause of the United States Constitution. See also *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1968). This right clearly includes the right to move to someplace and make a home. In *Saenz* the Supreme Court stated:

> Our cases have not identified any acceptable reason for qualifying the protection afforded by the Clause (Privileges and Immunities) for 'the citizen of State A who ventures into State B to settle there and establish a home.' *Zobel* 457 US at 74 (O'Conner, J., concurring in judgment). 526 U.S. 489 at 502.

The *Shapiro* decision clearly recognizes a right to migrate and resettle. 394 U.S.618 at 629 ("the right to travel includes the right to migrate, resettle, find a job and start a new life.")[10] In order to establish a violation of the right to travel, it is only necessary to show that the statute *potentially* deters travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 at 257-58.

Here class members live out of state and want to move back

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[10]See also *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 339-40(1972); See also Clark Allen Peterson, *The Resurgence of Durational Residency Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. LAW REVIEW, 305, 316-17(1993).

to Iowa. John Doe XIII, for example, left the state because there was no legal place to live. He lives in Indiana and wishes to return. Appx. p. 49a. The right to travel is implicated or negatively affected by a law in Iowa that essentially says that he cannot move back and live in any town or urban area. Telling out of state class members that they cannot live in most urban areas in Iowa potentially deters them from traveling to the state to live.

Most members of the class live in Iowa. Many are grandfathered into residences they were occupying on July 1, 2002. As time passes, more and more class members are having problems with the statute. The statute essentially says that they cannot move to another residence in most of the urban areas of the state. A person who, for whatever reason, loses this grandfathered residence cannot find another home in much of the state.

While not yet specifically recognized by a case from this court, the right to intrastate travel is similarly protected by the fundamental constitutional right to travel. The Sixth Circuit addressed this claim in *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002). That case found that the Cincinnati ordinance that excluded drug offenders from parts of the city was unconstitutional, specifically recognizing the right of individuals to move within the State of Ohio.[11] Judge

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[11]For other cases finding a constitutionally protected right to intrastate travel, see *Spencer v. Casavilla*, 903 F.2d 171, 174 (2nd Cir. 1990); *Lutz v. City of York*, 899 F.2d 255, 268 (3rd Cir. 1990). For state cases finding the right to intrastate travel violated by a banishment provision as a probation condition, see *People v. Beach*,

Colloton's opinion spoke highly of this right to intrastate travel, even quoting *United States v. Wheeler*, 254 U.S. 281, 293 (1920) as recognizing the fundamental right to "dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." Appx. p. 116a.

At the same time Judge Colloton rejected the argument that any fundamental right to travel, whether inter or intrastate, was violated. He reached this conclusion because he found that the Iowa statute "imposes no obstacle to a sex offender's entry into Iowa and does not erect an actual barrier to interstate movement." Appx. p. 114a. He reached the same conclusion with regard to intrastate movement. Because there is no real "obstacle" to travel, whether intrastate or interstate, he concludes that the constitutional analysis should not be done using strict scrutiny. Not surprisingly he then found the statute constitutional. Appx. p. 118a.

The statute however does create real barriers around most towns and cities in Iowa. The barrier exists in that sex offenders cannot live in those areas. It would be no less a barrier if the Legislature actually declared that sex offenders could not live in any town or city over 250 people. The right to travel protects the right to move someplace and establish a home. The Iowa statute is a barrier to the exercise of that right.

It is no less a barrier if sex offenders can come into the city

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147 Cal. App 3d 612, 622 (2nd Dist. 1983); See also *State v. Franklin*, 604 N.W.2d 79, 84 (Minn. 2000); *In re J.W.*, 787 N.E.2d 747, 763 (Ill. 2003).

limits of such towns for employment or shopping. If offenders cannot make their homes in a town, there is a barrier created by this statute that is real, is significant, and that implicates the right to travel.

If the fundamental right to travel is implicated, then 692A.2A strict scrutiny applies. Under that scrutiny the statute is the same exaggerated response as was discussed under *ex post facto* analysis. See Petition at p. 20-22. The statute should be found to be unconstitutional.

C. The decision conflicts with prior law with regard to the fundamental right to live with your family.

Twenty-five (25) years ago in the case of *Moore v. City of East Cleveland*, 431 U.S. 494, 503-4 (1977) this Court recognized that a zoning ordinance that substantially interfered with the ability of an extended family to live together impinged on a fundamental right protected by the Due Process Clause of the United States Constitution. Such an ordinance was different from the one that had been upheld in *Village of Bel Terre v. Boraas*, 416 U.S. 1 (1974). In that case the Supreme Court had found no constitutional problem with an ordinance that limited unrelated people living together. In the *Moore* case, however, the Court found that there was something special about the fact that the people who wanted to live together were actually part of the same family. Given that critical difference, the statute was subjected to strict scrutiny and was found wanting.

In *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984) the Supreme Court discussed the constitutionally protected "freedom of association." The Court said that it had

identified a line of decisions that had "concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role such relationships in safeguarding the individual freedom that is central to our constitutional scheme." 468 U.S. 609 at 617-8.

Iowa Code Section 692A.2A interferes with that fundamental right to live with your immediate family. In the first place the Iowa statute greatly limits the ability of class members to find any place to live. Under those circumstances, the one place many offenders look to for a place to live, is their family. The Iowa statute effectively prevents most sex offenders from moving in with their immediate family members because often those family members live in a town or city. Even if family members were inclined to move away from their homes, they would be unable to find a place under this statute.

John Doe IV was in prison in June 2003. He received a parole when it was determined that it was safe for him to return to the community. He wanted to come out and live with his mother in Mason City. This was an acceptable residence to his parole officer. Indeed parole officers often want offenders coming out of prison to live with family precisely because they regard it as a good support system. That in turn is important to successful treatment. This could not happen until the statute was enjoined because his mother lived within two thousand feet of a school or child care facility. Appellee's App. p. 44a.[12]

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[12]John Doe VI also wanted to live with his mother. He bought a home and they moved in together. This was acceptable to his parole officer. He was required to move because of the statute. Appx. p.

In this case, the statute does not directly prohibit members of the class from being able to live with their family members. The panel from the Eighth Circuit concluded that this lack of direct effect meant that there is no strict scrutiny, citing cases that say that certain incidental effects do not require strict scrutiny. Appx. p. 112a. On some level unless certain words appear in the statute, the effect of any statute can be called "incidental". Whether something is "incidental" however does not say anything about whether it is "significant." That term ought to be the one that is used in considering whether strict scrutiny applies. In *Zablocki v. Redhail*, 434 U.S. 374, 383-386 (1978) the Supreme Court struck down a Wisconsin law that required court permission to marry under certain conditions. The Court noted the following:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents

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44a-45a.

John Doe VIII was living in Iowa City without a legal residence. He wanted to move in with his parents, but that was prohibited by the statute. It was all right with his probation officer who did not think there was a safety reason to keep him out of his parents' home. App. p. 45a-46a.

John Doe XV was given work release by the Board of Parole. Because of the injunction, he was able to leave the work release center and go live with his mother. This was an acceptable residence. If the statute went back into effect, he would not be able to live with his mother. Appx. 51a-52a.

John Doe XVII was also released from prison. He wanted to live with his adult son. This was not permitted by the statute. App. p. 52a-53a.

> of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. 434 U.S.374 at 384.

The banishment created by the Iowa statue does in fact significantly interfere with the ability of the class members to live with their immediate family members. It is true that the family members could try to move from their established homes to the country to find a legal residence. Even if they could find such a residence, this requirement that they move would be a substantial burden. The legal question should be whether the Iowa statute creates a substantial burden on families living together. Given the factual determination regarding banishment and the interest in class members being able to live with family members, this Court should find a fundamental right involved and grant *certiorari*.

CONCLUSION

In July 2002, Section 692A.2A went into effect. This lawsuit was filed almost a year later, after the effects of the law began to be felt. During that year it became clear that the law has the effect of eliminating almost all housing for affected sex offenders. In fact it eliminates most housing in towns with a population of more than a couple hundred people. The statute effectively banishes most sex offenders to small towns and to

the countryside.[13] As the small towns figure this out they in turn will now take measures to avoid becoming sex offender havens. Given the lack of available housing in those areas the statute will make even more sex offenders homeless.

This law is unconstitutional in a number of ways. It violates several fundamental constitutional rights. It is punishment amounting to an *ex post facto* violation when applied to people who committed their crimes before July 1, 2002.

The intent of the legislature was to keep children safe. When all is said and done, however, this statute does not do that. In some ways it may increase the risk to children. While failing to keep children safe, the statute imposes a tremendous cost.

When society releases persons from prison or probation, when their sentences are over and the state is not asserting a right to keep them locked up, there must be someplace for those persons to live. In Iowa at this time that is not the case for sex offenders.

This court should grant *certiorari* to address the important questions presented by the Iowa law.

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[13]As this petition is being written, the small town of Ely, Iowa located in Linn County has just figured out from the new county map, that because they have no school or childcare facility, that the town has no restrictions. The city council is meeting to consider an ordinance to ban sex offenders from living within 2000 feet of a park. (They must have one of them.) Dick Hogan, *Ely considers sex offender restrictions*, THE CEDAR RAPIDS GAZETTE, September 24, 2005, pp. 1A, 8A. The council must not realize from reading the record in this case that they can accomplish their goal by finding a person to register a child care home.

No. _____

In The
Supreme Court of the United States

JOHN DOE I, JOHN DOE II, JOHN DOE III, on their own behalf and on behalf of the class -

Petitioners,

v.

THOMAS J. MILLER

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN DOE I, JOHN DOE II, and JOHN DOE III, on their own behalf and as representatives of the class of sex offenders in the State of Iowa,	*	3:03-cv-90067
Plaintiffs	*	
v.	*	
TOM MILLER, Iowa Attorney General and J. PATRICK WHITE, Johnson County Attorney and MICHAEL WOLF, Clinton County Attorney, as representatives of the class of all county attorneys in Iowa,	*	MEMORANDUM OPINION AND ORDER
Defendants.	*	

Three named Plaintiffs bring this action on behalf of a proposed class of Plaintiffs to challenge the constitutionality of the recently enacted Iowa Code § 692A.2A, which prohibits sex offenders, whose offenses were committed against minors, from residing within two-thousand feet from a school or child care facility. Presently before the Court are Plaintiffs' Motions to certify this action as a class action comprised of both plaintiff and defendant classes. Plaintiffs ask the Court to certify a Plaintiff class to include all sex offenders in Iowa, and a Defendant class made up of Iowa's individual County Attorneys. Plaintiffs also move for a Temporary Restraining Order (TRO), pursuant to Federal Rule of Civil Procedure 65(b), to enjoin Defendants from enforcing § 692A.2A until the parties have an opportunity to present evidence on preliminary injunctive relief. For the reasons explained below, Plaintiffs' Motions are granted.

I. IOWA CODE § 692A.2A

On May 9, 2002, Iowa Governor Thomas Vilsack signed Senate File 2197 into law. Effective July 1, 2002, Senate File 2197, now codified at Iowa Code § 692A.2A, states in full:

§ 692A.2A Residency restrictions – child care facilities and schools.

1. For purposes of this section, "*person*" means a person who has committed a criminal offense against a minor, or an aggravated offense.

sexually violent offense, or other relevant offense that involved a minor.

2. A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.
3. A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school, or a child care facility, commits an aggravated misdemeanor.
4. A person residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply:
   a. The person is required to serve a sentence at a jail, prison, juvenile facility, or other correctional institution or facility.
   b. The person is subject to an order of commitment under chapter 229A.
   c. The person has established a residence prior to July 1, 2002, or a school or child care facility is newly located on or after July 1, 2002.
   d. The person is a minor or a ward under a guardianship.

The plain text of § 692A.2A states that the statute

applies to any person who has committed a criminal offense against a minor. Plaintiffs indicate in their brief, however, that the law is generally being interpreted as applicable to individuals who have committed sex crimes against minors. Where applicable, the statute restricts the area in which an affected person may reside to places that are not within two-thousand feet from a school or child care facility. As the restriction is limited to residency, § 692A.2A does not otherwise prohibit an individual's presence within the restricted zone; affected persons are free to travel, work, or generally move about within any area. The statute contains no time frame regarding when a person committed his or her crime, but does include a limited "grandfather clause," whereby an individual who has established a residence prior to July 1, 2002 is exempted from the area restrictions. The duty to enforce § 692A.2A lies with the Iowa Attorney General and the individual County Attorneys for each of the State's ninety-nine counties. *See* Iowa Code §§ 13.2, 331.756(1).

II. CLASS CERTIFICATION

Plaintiffs ask the Court to certify both a Plaintiff and a Defendant class in this action. A proposed class must meet the requirements of Federal Rules of Procedure 23(a) and (b) in order to be certified. Section (a) of Rule 23 provides the prerequisites for any class action:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or

> defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Section (b) then lays out additional requirements that must be satisfied, depending on the type of class action:

> (1) the prosecution of separate action by or against individual members of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b). The party seeking class certification has the burden of showing that these prerequisites and requirements

are met. *Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994).

A. Plaintiff Class

Plaintiffs move the Court to certify a Plaintiff class consisting of "all sex offenders currently living in the state of Iowa, or who might wish to live in the state of Iowa." Plaintiffs ask the Court to specifically exclude from the class, any individual who is currently being prosecuted for a violation of § 692A.2A. In their Motion, Plaintiffs contend that the proposed class satisfies the requirements of Rule 23(a) and (b), and is, therefore, appropriate. The Court agrees.

1. Numerosity

Plaintiffs note that there are currently over 5000 sex offenders in Iowa, and over 4500 of these individuals had minors as their victims. Joinder of all of these parties would be undeniably impracticable. Add to this an untold number of persons who would fall under the purview of § 692A.2A should they ever move to Iowa and the numerosity requirement is certainly satisfied.

2. Common Questions of Fact or Law

Defendants contend that a Plaintiff class is inappropriate because of the individual circumstances of each potential Plaintiff. Defendants ask instead that the Court deal with each potential Plaintiff as he or she comes forward. Defendants offer nothing else to support their objection to certification of a Plaintiff class and the Court is unpersuaded.

Plaintiffs' Complaint attacks § 692A.2A on its face as an unconstitutional punishment and as an infringement on an

individual's right to family privacy and free travel; the Fifth Amendment right against self incrimination; and procedural Due Process guarantees of notice and an opportunity to be heard before being deprived of personal liberties. The Complaint and Affidavits from several John Does detail the effect of the statute on particular individuals, but Plaintiffs seek to challenge, as a class, the application of § 692A.2A to any individual included in the statute's definition of "person". The constitutional rights and civil liberties asserted are immutably held by all persons implicated under § 692A.2A. Accordingly, common questions of law abound irrespective of the facts of each class member's individual circumstances. As Plaintiffs bring this action as a facial challenge to § 692A.2A rather than as applied to each individually named Plaintiff, the Court finds that the commonality requirement is satisfied.

One exception here involves those persons who are currently being criminally prosecuted for violations of § 692A.2A. Under the *Younger* abstention doctrine, federal district courts should "abstain from hearings cases when (1) there is an ongoing state judicial proceeding which (2) implicates important state interests, and when (3) that proceeding affords an adequate opportunity to raise the federal questions presented." *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002) (quoting *Fuller v. Ulland*, 76 F.3d 957, 959 (8th Cir. 1996)). *See also Younger v. Harris*, 401 U.S. 37 (1971). Accordingly, the Court must abstain from interfering with the state court proceedings that have already been commenced, as the state courts of Iowa are

more than capable of assessing the constitutional validity of § 692A.2A as it is applied to these individuals. For this reason, the Court adopts the suggestion of Plaintiffs and excludes from this class action those individuals who are currently involved in state court proceedings regarding Iowa Code § 692A.2A.

3. Typicality and Adequate Representation

The third and fourth components of Rule 23(a) require that the claims or defenses of the class representatives be typical of those of the class, and that the class representatives will fairly and adequately protect the interests of the class. There is no suggestion that the claims of the named John Doe Plaintiffs are atypical from the claims of other class members. As well, the Court has no reason to doubt the ability of the named Plaintiffs and their attorneys to fairly and adequately represent the interests of the class. The Court, therefore, finds that the four elements of Rule 23(a) are satisfied.

4. Type of Class Action - Rule 23 (b)

As noted above, in addition to satisfying the four elements of class certification set forth in Rule 23(a), a proposed class must be maintainable as one of the three types of class actions defined in Rule 23(b). Here, Plaintiffs argue that the proposed class is properly maintained under 23(b)(1)(A), as prosecutions of separate actions by the class members would create a risk of inconsistent judgments with respect to the members of the class which would establish incompatible standards of conduct for the Defendants. The Court agrees. Were the Court to deny class certification, thereby compelling each member of the Plaintiff class to individually challenge § 692A.2A against each

of the various County Attorneys, the risk of inconsistency is enormous.

5. Class Defined, Notice, and Exclusion from Class

Pursuant to Rule 23(c)(1), the Court finds that the proposed Plaintiff class satisfies all of the requirements of Rule 23, and hereby certifies a Plaintiff class in this action under Rule 23(b)(1)(A). The Plaintiff class shall be defined as "All individuals defined as a "person" by Iowa Code § 692A.2A (1) currently living in the state of Iowa, or who might wish to live in the state of Iowa, excluding those individuals currently being prosecuted under Iowa Code § 692A.2A in the Iowa state courts." As the Plaintiff class is certified under Rule 23(b)(1)(A), the notice and exclusion provisions of Rule 23(c)(2) are inapplicable.

B. Defendant Class

Plaintiffs also move the Court to certify a Defendant class in this action including all County Attorneys in the State of Iowa, in their official capacity. Plaintiffs have named J. Patrick White, Johnson County Attorney, and Michael Wolf, Clinton County Attorney, as class representatives. Defendants have not opposed the certification of a Defendant class, but both Mr. White and Mr. Wolf have expressed reluctance to being named as class representatives.

The analysis of the proposed Defendant class is largely identical to that for the Plaintiff class. Again looking at the requirements of Rule 23(a): 1) with ninety-nine counties in Iowa, joinder of each individual County Attorney is impracticable; 2) as with the Plaintiff class, there are questions

of law common to all Defendants; and 3) the defenses of the representative Defendants appear to be typical of the defenses of the class of Defendant County Attorneys.

As for the fourth requirement of Rule 23, fair and adequate representation of the interests of the class, the representative Defendants' reluctance to serve as class representatives must be addressed. The Ninth Circuit Court of Appeals has stated that "[a]dequate representation 'depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162) (9th Cir. 2001) (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1995) (quoting *Brown v. Ticor Title Ins. Co* , 982 F.2d 386, 390 (9th Cir. 1992))). The proposed Defendant class members and the named representatives in the present action are all Iowa County Attorneys who must each satisfy identical requirements under Iowa Code § 331.751(2) to hold office. Each individual class member is, therefore, equally qualified to act as a class representative. There is no suggestion that this lawsuit is collusive.

The question, then, is whether the named class representatives share the interests of the class without antagonism. All County Attorneys in Iowa are charged by law with a duty to "[d]iligently enforce or cause to be enforced in the county, state laws and county ordinances, violations of which may be commenced or prosecuted in the name of the